

(1987) 03 CAL CK 0028
In the Calcutta High Court
Case No : F.M.A.T. No. 792 of 1986

Sm. Muktakesi Dawn and Others

APPELLANT

Vs

Haripada Mazumdar and Another

RESPONDENT

Date of Decision : 04-03-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1988 Cal 25 : 91 CWN 1094

Hon'ble Judges : Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : Shyama Prasanna Roy Chowdhury, Sudipta Roy and Anil Rakshit, for the Appellant; Sakti Nath Mukherjee and Bhaskar Ghose, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Bhattacharjee, J.—The impugned order of ad interim ex parte injunction has been assailed by Mr. Roy Chowdhury, the learned counsel for the appellants, on more grounds than one, but none appears to be of that substance to warrant our intervention in this appeal.

2. Mr. Roy Chowdhury has firstly submitted that under the provisions of Rule 3 of Order 39 of the Civil P. C. as amended by the Amendment Act of 1976, the Court can grant an injunction ex parte before serving notice on the opposite party only when it is satisfied that the object of granting injunction would be defeated by the delay in serving such notice and, while granting such injunction ex parte, the court, "shall record the reasons for its" opinion" that the object of granting injunction would be defeated by such delay. Mr. Roy Chowdhury has accordingly urged that the impugned order of ex parte injunction is bad as no such opinion or any reason therefore has been recorded by the trial Judge. It is true that the relevant Proviso to Rule 3, as inserted by the Amendment Act of 1976, mandates recording of such reasons and that for good reasons. Firstly, such recording of reasons would, to borrow from the old Privy Council decision in Gunga Gobind

Mundul (1867) 11 Moo IA 345 , operate as a check against a too easy granting of ex parte injunction and may inspire confidence and disarm objection. And secondly, since an appeal lies against such ex parte order of injunction, such record of reasons would go a very long way to help the appellate Court to ascertain as to whether the discretion granted under the Rule to grant ex parte injunction has been properly exercised. But even then, we are inclined to think that the mandate in the Proviso to Rule 3 to record reasons is not that mandatory to warrant reversal of an order solely on the ground of omission to record reasons. If there are materials on record to show that there were good reasons to pass an ex parte injunction order, the order cannot be set at naught solely on the ground that the Court, while making the order, did not record the reasons for proceeding ex parte.

3. Reference in this connection may be made to Rule 27(2) of Order 41 of the Code which requires that the appellate Court, while allowing additional evidence to be adduced, "shall record the reason for its admission". But in AIR 1939 152 (Privy Council) , the Privy Council approved the admission of evidence at the appellate stage even though the Judicial Commissioner, while admitting the evidence in appeal, did not record his reasons therefore as required by this Rule. And the point now appears to have been clinched by the five-Judge Bench Judgment of the Supreme Court in K. Venkataramiah Vs. A. Seetharama Reddy and Others, , where Das Gupta, J., speaking for the Court, ruled (at 1529) that the provision requiring recording of reasons in Rule 27(2) is not mandatory and the failure to do so would not vitiate reception of evidence if such reception was otherwise justified under the Rules. We have no doubt that the ratio in K. Venkataramiah (supra) would go the full length to fortify our view that the provision relating to recording of reasons for granting ex parte injunction, as required by Rule 3 of Order 39 of the Code, though couched in imperative form, is not mandatory in substance and if we overturn an otherwise justifiable ex parte order of injunction solely on the ground of omission to record reasons, we would be giving undue preference to mere form over real substance. We accordingly reject the contention of Mr. Roy Chodhury on this score.

4. Mr. Roy Chowdhury has secondly urged that an injunction restraining the defendant from transferring the suit property was absolutely unnecessary as no post-suit transfer by the defendant can adversely affect the result of the suit because of the provisions of Section 52 of the T. P, Act whereunder all such transfers cannot but abide by the result of the suit. It is true that the doctrine of lis pendens as enunciated in Section 52 of the T. P. Act takes care of all pendente lite transfers; but it may not always be good enough to take fullest care of the plaintiffs interest vis-a-vis such a transfer. The suit giving rise to the impugned order is one for specific performance of sale in respect of the suit property and if the defendant is not restrained from selling the property to a third party and accordingly a third party purchases the same bona fide for value without any notice of the pending litigation and spends a huge sum for the improvement thereof or for construction thereon, the equity in his favour may intervene to

persuade the Court to decline, in the exercise of its discretion, the equitable relief of specific performance to the plaintiff at the trial and to award damages only in favour of the plaintiff. It must be noted that Rule 1 of Order 39 of the Code clearly provides for interim injunction restraining the alienation or sale of the suit property and if the doctrine of *lis pendens* as enacted in Section 52 of the T. P. Act was regarded to have provided all the panacea against *pendente lite* transfers, the Legislature would not have provided in Rule 1 for interim! injunction restraining the transfer of suit property. Rule 1 of Order 39, in our view, clearly demonstrates that, notwithstanding the Rule of *lis pendens* in Section 52 of the T. P. Act, there can be occasion for the grant of injunction restraining *pendente lite* transfers in a fit and proper case.

5. Mr. Mukherjee, appearing for the respondents has drawn our attention to an old Division Bench decision of this Court in *Promotha Nath v. Jagannath* (1913) 17 Cal LJ 427 where it has been observed that a Court will in many cases interfere and preserve property in status quo during the pendency of a suit in which the rights to it are to be decided and though the purchaser *pendente lite* would not gain title, the Court will prevent by injunction the embarrassment that would be caused to the original purchaser in his suit against the vendor. And it has been ruled there on the authority of *Turner, LJ in Hadley v. London Bank of Scotland* (1865) 3 De GJ & S 63 that if there is a clear valid contract for transfer, the Court will not permit the transferor afterwards to transfer the legal estate to third person, although such third person would be affected by *lis pendens*. Mr. Mukherjee has drawn our attention to Dr. S. C. Banerji's *Tagore Law Lectures on Specific Relief* (2nd Edition, page 592) where the decision in *Promotha Nath* (*supra*) has been approvingly referred to and also to Fry's *Treatise on Specific Performance* (6th Edition) where the same rule has been enunciated as a general principle on the authority of *Turner, L.J., in Hadley v. London Bank of Scotland* (*supra*). We accordingly reject this contention of Mr. Roy Choudhury that the impugned order of injunction restraining *pendente lite* transfer ought not to have been granted as the rule of *lis pendens*, as enacted in Section 52 of the T. P. Act, is there to take care of such transfer.

6. On the merits also we are satisfied that the trial Judge was justified in making the impugned order of injunction. The defendant has not as yet filed his show cause against the plaintiffs application for injunction and, therefore, at this stage, all the statements made in the application will have to be accepted as true *modo et forma*. And when so taken, the allegations, in our view, make out a case for *ad interim* injunction. As and when such show cause would be filed by the defendant and the plaintiffs application for injunction would be taken up for final hearing, the learned trial Judge would obviously consider such show cause and all such materials as would then be available to him and would come to his own finding as to whether a case for temporary injunction till the disposal of the suit has or has not been made out and he should do so being wholly uninfluenced by any observation made by us herein as to the merits. As is well known, findings arrived at in dealing with applications for temporary injunction pending disposal

of suit, even if they relate to any material question involved in the suit, cannot take the place of findings in the final decision of the suit if any citation is necessary for such a well established proposition, reference may be made to the observations of Das Gupta, J., (as his Lordship then was) in the Division Bench decision of this Court in Ashalata Mitra Vs. A.D. Viz, . A fortiori, therefore, the findings, if any, made by us in disposing of this appeal against the impugned order of ex parte injunction cannot in any way take the place of the findings to be arrived at in disposing the application for temporary injunction now pending before the learned trial Judge. But on the materials now on record we are of opinion that the learned trial Judge was not wrong in making the impugned order.

7. We accordingly dismiss the appeal, but do not make any order as to costs and we direct the learned trial Judge to hear out the application for temporary injunction now pending before him as expeditiously as possible. Let a copy of this order along with the records of the case, if any, be transmitted to the court below forthwith.

Ajit Kumar Nayak, J.

8. I agree.